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EDITORIAL COMMENTARY

Judge Stanley Sporkin?

The Former SEC Activist Is Unfit for the Federal Bench

STAT a multi-faceted diamond, or perhaps more accurately a rhinestone, the nomination of Stanley Sporkin as a U.S. District Court judge for the District of Columbia reflects a chill light, from whichever angle it is eyed, upon the workings of Washington. The Senate has been eyeing it with some reluctance, in fact, since it was first proposed as long ago as June 1984. Last week, the Judiciary Committee took the unusual step of holding closed sessions on it. More are planned.

Faithful readers will remember *Barron's* long-time complaints about Sporkin's rampaging reign (1974-1981) as head of the Division of Enforcement at the Securities and Exchange Commission, where he was a career bureaucrat. After President Reagan's election, the transition team inquiring into the SEC actually recommended that Sporkin be removed. But in the event this feat was achieved by the unexpected means of a summons to be general counsel to the Central Intelligence Agency from its new Director, William J. Casey, a key Reagan backer who briefly headed the SEC during the Nixon Administration. Now Casey is the prime mover in Sporkin's elevation to the federal bench.

Opposition to Sporkin springs from several sources. The Senate Judiciary Committee's closed sessions are focusing on serious allegations of impropriety in Sporkin's conduct at the CIA. But no investigation, other than a simple inspection of the public record, is needed to determine that the likelihood of "Judge" Sporkin contributing to the Administration's professed objective of curbing judicial activism—what President Reagan recently condemned as the tendency to view courts as "vehicles for political action and social experimentation"—is not merely remote, but also absurd. On several counts, his nomination would be a travesty of justice.

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To begin with, something distinctly peculiar does seem to have happened at the CIA. In 1984, Charles E. Waterman, a deputy chairman of the National Intelligence Council who directed analyses of Middle Eastern affairs, left the agency after allegedly leaking classified information to commercial interests. The Committee is looking into allegations that Sporkin shielded Waterman from prosecution and even arranged counsel for him. The Committee is also said to be investigating whether this was done at the behest of Casey personally, rather than in pursuit of some CIA purpose.

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The relationship between Casey and Sporkin has always appeared improbable. Casey, whatever else can be said about him, is an outspoken conservative, as well as a practicing capitalist who has been involved in several lawsuits. Sporkin, although registered as an independent, is generally viewed as a liberal Democrat. As late as February 1980, he was publicly denouncing criticism of government regulation and calling for "new Naders." His views on this subject take on a grim significance now because the District of Columbia court is where federal regulatory bodies frequently bring their legal actions.

A common explanation of the Casey-Sporkin entente is that it goes back to the days of Watergate, when Sporkin is supposed to have advised Casey to resist White House pressure over the investigation of Robert Vesco, thus sparing him from the disaster that overtook the next SEC chairman, Bradford Cook, who was compelled to resign.

According to agency documents released to the Center for National Security Studies, obtained in response to requests under the Freedom of Information Act, Sporkin seems to have spent a remarkable amount of his time at the CIA on matters relating to Casey and securities law. There has been prolonged controversy over the director's protracted attempt to continue trading his portfolio rather than putting it into a blind trust, which he finally did in 1983, and over his holdings in companies with CIA contracts. Casey has been quoted expressing anger over the underlying innuendoes: "Theoretically, I could make money [with information obtained from] the CIA, but the idea that I did is crap. It's hogwash."

Senate Democrats have shown interest in exploiting the Sporkin hearings to further their campaign against Casey, but it is noteworthy that the strongest opposition to the nomination comes from conservative Republicans, despite party loyalty and Casey's formidable reputation for vengefulness. Some of this can no doubt be attributed to disquiet over Sporkin's answers to questions designed to elicit his attitudes to social issues like school prayer and abortion.

Sporkin's nomination also met resistance within the Justice Department, so strong as to require Casey's influence with the White House to overcome. One objection was to Sporkin's limited trial experience. This is viewed as a serious impediment for a district court judge, who must actually deal with the sweaty litigants filtered out at the more rarified appellate level. At the SEC, Sporkin's strategy was to avoid litigation in favor of negotiating consent decrees. It is easy to find negative comment on his enforcement team's trial performance from other attorneys ("most of them don't know basic courtroom etiquette," one prominent member of the securities bar told a business weekly, "let alone how to lay in a proper line of questioning") and judges ("not clearly established or articulated," said federal Judge Edward Weinfeld, in denying the SEC's motion for preliminary injunctions in the Petrofunds Inc. case).

Another factor the Justice Department normally weighs is temperament. Again, there is no difficulty in finding stories of a choleric, despotic disposition, albeit revealed fully only to subordinates and the targets of SEC investigations. One source even claims that Sporkin has the disconcerting habit of shutting his eyes when confronted with unwelcome arguments. Still, justice, after all, is supposed to be blind.

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However, the fundamental objection to Sporkin must be his behavior at the SEC. It is crucial to note that this is not a matter of his operating within the framework of an institution which *Barron's* quirkily happens to consider wholly misconceived. The point is that Sporkin consistently and aggressively went beyond the official framework, using interpretations of the law that he at various times described as "innovative" and "creative." This is precisely the mark of the judicial activist, rationalized in exactly the language of judicial activism. Sporkin's innovations were so creative that civil libertarians like Monroe Freedman came to believe that they encroached on the constitutional rights of his victims. Once when challenged on this score, Sporkin, according to Emory University's Professor Henry G. Manne, angrily replied that "these are the fat cats we're dealing with!"

Former SEC Commissioner Roberta Karmel, in her discreet but devastating *Regulation by Prosecution*, provides telling details of Sporkin's "creativity" up to 1980. During this time span, when he effectively dominated the agency, it made a vigorous effort to conscript the legal and accounting professions into serving as SEC auxiliaries in monitoring their clients; to impose upon public companies various nostrums of the Naderite "corporate governance" movement, such as federal licensing of directors; to reform the foreign marketing practices of American business; to federalize corporation law; and to increase SEC control over the municipal bond market. Expanding the concept of insider trading and stiffening the regulation of investment letters might also be cited.

The SEC's basic tool was "innovative" litigation. After 1975, the Commission was increasingly rebuffed, often in very harsh terms, by courts which were less inclined to read into the statutes whatever it wanted. This trend, in turn, enhanced the attractiveness of negotiated consent decrees, since fine points of law could be swamped by the SEC's political power, notably its influence with a shamefully adulatory press. When Roberta Karmel persisted in arguing about the legal merits of one case, there was a "verbal explosion" from Sporkin: "I don't know why you care so much about what the courts will think and not about what I think."

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After 30 years of unprecedented judicial imperialism, in which judges have unilaterally imposed radical reforms in areas as diverse as racial quotas, capital punishment and legislative apportionment, it is scarcely surprising that many Americans regard judges as a species of legislator, and increasingly demand that they submit to litmus tests like abortion. In a little-noted parallel development, some power-hungry law professors have declared that "strict construction," sticking to the letter of the law and the intention of its framers, is an impossible ideal, and thus that liberalism should come to be regarded as the law of the land instead. Harvard's Lawrence Tribe has even proposed that no Supreme Court nominee be confirmed unless he agrees with the *Roe vs. Wade* decision legalizing abortion—sort of an Ivy League litmus test.

This is like history professors saying that, because objectivity is impossible, we are all free to lie—and that our lies should be liberal lies. Without judicial restraint, there can be no government of laws. Jurisprudential philosophy should be the center of the Senate's confirmation process. By this standard alone, Sporkin's nomination is a reproach to the Administration. It should be allowed to die with the Christmas recess, and Sporkin dispatched to the lucrative private practice which, in a naughty world, surely awaits him.

—Peter Brimelow